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No. 482

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS AND JAMES CASTNER

*Petitioners.*

v.

JACOB PERKO

---

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

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## BRIEF FOR PETITIONERS

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## BRIEF FOR PETITIONERS

---

### OPINIONS BELOW

The first opinion of the Supreme Court of Ohio (R. 8), reversing an order of dismissal for lack of jurisdiction and remanding the case for trial, is reported at 168 Ohio St. 161, 151 N. E. 2d 742.

The second opinion of the Supreme Court of Ohio (R. 16), reversing a judgment for defendants and ordering a new trial, is reported at 171 Ohio St. 68, 167 N. E. 2d 903.

The opinion of the Court of Appeals of the Seventh Appellate District of Ohio (R. 182), affirming the judgment

for plaintiff entered after the second trial, is not yet officially reported. It is reported unofficially at 90 Ohio L. Abs. 65.

The order of the Supreme Court of Ohio dismissing the defendants' appeal as of right for lack of a "debatable constitutional question" is reported at 173 Ohio St. 576, 184 N. E. 2d 100.

## JURISDICTION

The final judgment of the Supreme Court of Ohio was entered on July 5, 1962. The petition for certiorari was filed in this Court on October 3, 1962, and granted on December 17, 1962. This Court has jurisdiction under 28 U. S. C. § 1257 (3).

## QUESTIONS PRESENTED

Whether the National Labor Relations Act precludes a state court from exercising jurisdiction in an action for damages brought by a union member against his union based on the claim that the union wrongfully forced his employer to discharge him, and other employers not to hire him, because he had violated a union rule.

## STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Article 6, Clause 2 of the Constitution of the United States provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 2(3) of the National Labor Relations Act, 49 Stat. 450 (1935), as amended, 29 U. S. C. § 152(3) (1958), states as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor. . . ."

Section 2(11) of the Act, 49 Stat. 450 (1935), as amended, 29 U. S. C. § 152(11) (1958), states as follows:

> "The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 7 of the Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 157 (1958), states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 158(a)(3) (1958), states in pertinent part as follows:

"It shall be an unfair labor practice for an employer—

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made; . . . provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b) of the Act, 61 Stat. 140 (1947), 29 U. S. C. § 158(b) (1958), states in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the

exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

Section 10(a) of the Act, 49 Stat. 453 (1935), as amended, 29 U. S. C. § 160(a) (1958), states as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

## STATEMENT OF THE CASE

This case comes to this Court after having been through the courts of the State of Ohio three times. In order to understand the nature of the federal questions presented, and the manner in which they were raised below, it is necessary to review the somewhat long and tortuous history of this litigation.

### *The First Round*

On February 8, 1956, the plaintiff, Jacob Perko, filed a petition in the Court of Common Pleas of Mahoning County, Ohio, against Local 207 of the International Association of Bridge, Structural, and Ornamental Iron Workers (hereinafter referred to as the union) and certain of its individual officers as representatives of the members of that Local, seeking damages under the state common law (R. 1). The petition alleged that for many years the plaintiff had been a member in good standing of the union and had been employed as a "foreman" by the William B. Pollock Company. It further alleged that the defendants, "without justification," conspired to deprive the plaintiff of his right to work for that company or "for any other company in the geographic jurisdiction of Local 207" either as a "foreman" or "superintendent," and that, in furtherance of this conspiracy, the defendants first demanded that the Pollock Company discharge the plaintiff from employment, and subsequently "instituted a strike" against the company "for the sole purpose of coercing the William B. Pollock Company into discharging the plaintiff." As a result, according to the petition, plaintiff was discharged from his employment, and prevented from obtaining other employment, all to his financial detriment.

Defendants filed an answer (R. 3) and a motion to dismiss the petition on the ground that the court lacked jurisdiction over the subject matter (R. 5). In support of the motion, defendants argued, first, that the conduct alleged to have been engaged in by defendants would, if proved,

constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board, and second, that plaintiff has failed to exhaust the remedies available to him under the union's constitution and by-laws (R. 9). The court, after argument, dismissed the action on the second ground (R. 5), and the plaintiff appealed.

The Ohio Court of Appeals of the Seventh Appellate District affirmed the judgment without opinion (R. 6). The plaintiff then appealed to the Ohio Supreme Court, which reversed the judgment below and remanded the case for trial.

The Supreme Court wrote an opinion (R. 8) which dealt with both of the defendants' arguments. It first disposed of the ground on which the trial court had relied—plaintiff's failure to exhaust internal union remedies—by holding that plaintiff was not seeking to redress any of his rights as a member of the union, but was seeking to remedy the alleged interference with his employment relationship, a common law tort, to which no internal union remedies were applicable.

Turning then to the question of federal pre-emption, the court stated the following:

> "Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell,* and *Interna-*

*tional Association of Machinists* v. *Gonzales* (decided May 26, 1958), 355 U. S. ————" (R. 9-10).

Accordingly, the case was remanded for trial.

### *The Second Round*

On remand, the defendants amended their answer by adding as an additional defense the allegation that the conduct alleged to have been engaged in by the defendants was a protected activity under Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 157 (1958) (R. 12). The case was then tried to a jury. Defendants moved for a directed verdict at the close of plaintiff's case and at the close of the trial, but the court permitted the case to go to the jury. However, the jury was unable to reach a verdict and the court then granted defendants' motion and directed a verdict in their favor (R. 13).

On appeal, this judgment was affirmed by the Court of Appeals without opinion (R. 14), and the plaintiff again appealed to the Ohio Supreme Court.

The Supreme Court again reversed and remanded the case for a second trial. Stating that "the jurisdiction of the trial court to hear this action was determined by this court in its prior decision," the court dealt in depth only with the question of whether the trial court had applied the correct test in determining whether the evidence justified a directed verdict. On this question, the court held that "the finding of the trial court that the defendant is 'entitled by law to judgment upon the evidence received on the trial' was not a finding that there was no evidence to support a judgment for the plaintiff," and that the directed verdict must therefore be set aside and the case remanded for another trial (R. 17). Three of the judges noted their dissent, but wrote no dissenting opinion.

### *The Third Round*

The case was then tried a second time. The evidence established that plaintiff was a member of the defendant union, which represents iron workers in the Youngstown, Ohio area. He had for many years been employed by the William B. Pollock Company (R. 22), a firm engaged in the business of erecting blast furnaces and performing similar fabrication and construction work for the basic steel industry in various parts of the country (R. 27-28, 132). The Pollock Company was covered by a collective bargaining agreement between the Steel Erectors Chapter of the Mahoning Valley Builders Association, with which it was affiliated, and the union (R. 89).

Plaintiff generally worked as either a "foreman" or a "superintendent" (R. 22). A "superintendent" is the supervisor of an entire construction project. Under him work a number of groups of employees, of various crafts, each represented by the appropriate craft union. One member of each such craft group is designated as its "foreman," and has the responsibility of receiving orders from the superintendent and transmitting them to his particular crew (R. 50-51, 111, 127). Unlike the superintendent, the foreman is always a member of the union (R. 103), and his wages, while somewhat higher than those of the other crew members, are established by the collective bargaining agreement (R. 90).

Over a period of years, there had been a dispute between the defendant union and another union, the Boilermakers, as to which union should perform the work of erecting blast furnaces (R. 29-31, 91-92). As a result of this dispute, the defendant union in 1951 adopted a rule providing "that any member that leaves the iron workers to go in as a boilermaker or assist them in any way will be fined $500." (R. 106).

In December, 1953, plaintiff was superintendent of a Pollock project at the Ohio Works of United States Steel

Corporation (R. 23). In that capacity, he instructed boilermakers in the performance of work which the iron workers claimed (R. 43-44). The dispute over which union was entitled to the work was referred to a "labor management committee" established by agreement among the various unions and employers in the construction industry, and work on the job was halted pending settlement of the dispute (R. 32-33). The same basic dispute also caused a strike at another Pollock Company project at Hubbard, Ohio (R. 32-33).

On December 4, 1953, plaintiff was charged, within the union, with having assisted boilermakers in violation of the union's rule (R. 164). He was tried, found guilty, fined, and suspended from membership pending payment of the fine (R. 54-55). The fine was later suspended by the parent International Union and plaintiff was placed on "probation" and permitted to resume payment of dues (R. 81).

The jurisdictional dispute was settled by an award of the labor-management committee, which gave some of the work to the iron workers and some to the boilermakers (R. 23).

The facts so far stated are not disputed. At this point, however, sharp conflicts appear in the testimony. According to the evidence introduced by the plaintiff, when the iron workers resumed work on the project where plaintiff was employed, they informed the Pollock Company that they would no longer take orders from plaintiff because he had assisted boilermakers (R. 9, 14). Plaintiff remained in the Pollock Company's employ until that particular job was completed, and for several weeks thereafter (R. 36-37). The Company's field superintendent testified that plaintiff was finally let go because of "his dispute with the union" (R. 37). He admitted, however, that he did not check with the union to see whether the "dispute" in fact still existed, but simply took plaintiff's word for it (R. 39).

Plaintiff testified that he subsequently tried to obtain em-

ployment with the Pollock Company, without success (R. 61-62). He also testified that the American Bridge Division of United States Steel Corporation offered "me a foreman's job if I could get straightened on the Union," but that he had told the Company that "I can't get straightened out" (R. 67). However, the construction superintendent of American Bridge, with whom plaintiff had spoken, remembered these events rather differently. He testified that there was no job available at the time the plaintiff spoke to him (R. 145), and that if there had been an opening he "probably would have" hired plaintiff, even though plaintiff had told him that the union had barred him from working as a superintendent or a foreman (R. 147). He also testified that he did not know that plaintiff was over age 65 at the time, and that, had he known, he could not have hired plaintiff in any event, because of his company's policy against hiring men of that age (R. 152).

Plaintiff admitted that he had not been refused employment by any employer other than the Pollock Company and American Bridge (R. 74). He also admitted that he had successfully obtained employment at several other companies (R. 70-73). The employment in each case was short. He did not earn more than $1200 in any year, and therefore his eligibility for old-age benefits under Social Security, which he was receiving throughout this period, was unaffected (R. 70-73).

The union representatives who testified denied that the union had in any way attempted to interfere with plaintiff's employment (R. 97, 109, 122). In addition, eight employers who employed iron workers represented by the union testified that the union had never said to them that they could not hire the plaintiff (R. 127, 129, 136, 138, 140, 143, 147, 159). Most of these employers were engaged in the same type of business as the Pollock Company, belonged to the same employer association, and were covered by the same collective bargaining agreement (R. 89).

At the close of the evidence, defendants moved for a directed verdict, on the twin grounds of insufficient evidence and federal pre-emption under the National Labor Relations Act. The motion was denied (R. 168).

The trial judge then instructed the jury. He first summarized the essential contentions of the plaintiff as follows:

> "That the Defendant union, its officers and members, conspired to deprive him of his right to continue to work as a foreman for not only the William B. Pollock Company but for any other company in this jurisdiction of the Local; that in furtherance of this that Defendant notified his employer, the William B. Pollock Company, that Plaintiff's foreman's rights had been suspended and demanded without cause that he be discharged from his employment;
>
> "That this company refused to do so and continued to employ him, the plaintiff, as foreman until January 26, 1954; that the Defendants then in the furtherance of their conspiracy to deprive Plaintiff of his right to work as foreman or superintendent unlawfully instituted a strike by the members of the Defendant Local against the Company on the job being performed at Hubbard, Ohio, for the sole purpose of coercing the William B. Pollock Company to discharge the Plaintiff as a foreman;
>
> "That as a consequence of this he was discharged from his employment by the William B. Pollock Company on that date;
>
> "That the Defendant since the time of this discharge without justification prevented plaintiff from procuring employment as a foreman in iron work by representing that he was suspended from the Union; that he, the Plaintiff, was at the time of filing this Petition 68 years of age, and that he had no other means of livelihood; that he had been earning previous to his discharge

> $15,000 a year and has not been able since to earn more than $1,000 per year . . ." (R. 170-171).

The Judge then proceeded to instruct the jury as to the applicable common law, stating, in effect, that if the plaintiff had proved the above contentions by a preponderance of the evidence then he would be entitled to recover damages (R. 173).

The jury, after extensive deliberations which almost ended in a deadlock, finally returned a verdict of $25,000 for the plaintiff (R. 177-79). The court entered judgment accordingly (R. 179), and denied the defendant's motions for judgment N.O.V. and for a new trial (R. 180-81).

Defendants appealed to the Court of Appeals, which affirmed the judgment. Accepting the prior decision of the Ohio Supreme Court as the law of the case, it held that the matter in controversy was not subject to the exclusive jurisdiction of the NLRB. In reply to defendant's argument that the conduct complained of was arguably protected by Section 7 of the National Labor Relations Act, the Court stated:

> "It is true that Section 7 protects the men and the union when they organize for, among other things, 'other mutual aid or protection.' But we see nothing in these words which allow them to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law action is not eliminated" (R. 184).

On the question of the sufficiency of the evidence to support the verdict, the court noted that "with all the testimony there is very little that supports the cause sued on here," but held:

> "We cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for plaintiff. Under the ruling in the second

> Perko v. Union appeal . . . , to support a directed verdict the trial court would have had to so find. We are bound by that case" (R. 184).

Defendants then appealed to the Supreme Court of Ohio, both by motion for an order directing the Court of Appeals to certify its record, and by invoking the right to appeal as to constitutional questions. The Court, without opinion, denied the motion to certify the record (R. 187), and dismissed the appeal on the ground "that no debatable constitutional question exists herein" (R. 189).

Having thus exhausted the available state remedies, defendants petitioned this Court for certiorari. The writ was granted on December 17, 1962 (R. 187).

## ARGUMENT

### *Introduction*

In this case the Court is again called upon to determine whether a state court has ventured into territory pre-empted by the National Labor Relations Act. The governing principle, which has evolved over a long time of decisions of this Court,[1] achieved its final formulation in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244-45 (1959):

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state juris-

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[1] See, *e.g.*, *Hill* v. *Florida*, 325 U. S. 538 (1945); *International Union, UAW v. O'Brien*, 339 U. S. 454 (1950); *Amalgamated Assn.* v. *Wisconsin Employment Relations Bd.*, 340 U. S. 383 (1951); *Garner* v. *Teamsters Local No. 776*, 346 U. S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955); *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1 (1957); *Youngdahl* v. *Rainfair*, 355 U. S. 131 (1957); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962).

> diction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law . . .
>
> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board . . .
>
> ". . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

This rule, of course, is simply an implementation of the "Supremacy Clause" of Article 6 of the Constitution, which makes federal law "the supreme Law of the Land" and provides that "the Judges in every State shall be bound thereby." Since Congress has enacted a comprehensive statute regulating labor relations in industries affecting commerce, and since that statute vests the National Labor Relations Board with exclusive primary jurisdiction for its interpretation and enforcement, it follows that no state law may be applied to activities which are governed by the federal statute, and that no other tribunal, state or federal, can exercise the jurisdiction which Congress has entrusted exclusively to the Board.

This Court has recognized only two exceptions to this general principle. It has permitted the state courts to exercise jurisdiction in cases involving physical violence, even

though there may also be involved an arguable violation of the federal Act, because of the "compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace . . ." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. at 247 (and cases there cited). And it has permitted the state courts to exercise jurisdiction in suits based on alleged violations of union membership rights, on the ground that such matters are of "merely peripheral concern" to the federal regulatory scheme. *Id.* at 243. See *International Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (1958).[2]

There are thus two questions which this Court must decide in this case. The first is whether the conduct which the Ohio courts found to be tortious under state law is the type of conduct which is regulated by the National Labor Relations Act. The second is whether there is any basis in this case for applying either of the two established exceptions—or for fashioning a new exception—to the doctrine

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[2] This Court has also held that state courts may entertain actions for breach of collective bargaining agreements, even though the conduct which allegedly violated the agreement may also be an unfair labor practice. *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962). That decision, however, does not constitute another exception to the principle of federal pre-emption, since it does not mean that state courts may apply state law in such actions. This Court had previously held that federal law, derived from the federal labor policy, is applicable in actions to enforce collective bargaining agreements, whether such actions are brought in state or federal court. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). The sole question in *Smith*, therefore, was not whether federal or state law was applicable, but whether Congress intended to deprive the courts of jurisdiction to remedy a breach of a collective bargaining agreement which also might be an unfair labor practice. This Court, relying on the fact that Congress specifically gave the courts jurisdiction to enforce collective agreements, held that Congress did not so intend. Thus *Smith* involved simply the accommodation of two principles of federal law, not an accommodation between state and federal law. Accordingly, it has no bearing on this case.

of federal pre-emption. We will deal with each of these issues in turn.

## I. THE CONDUCT WHICH THE OHIO COURTS FOUND TO BE TORTIOUS UNDER STATE LAW IS REGULATED BY THE NATIONAL LABOR RELATIONS ACT AND IS SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NLRB

Plaintiff's case claimed that the union had forced his employer to discharge him, and other employers not to hire him, because he had violated the union's rule against assisting boilermakers. If true, the action complained of was concerted action by the union (and its members) to preserve jobs for the union members by obtaining the removal of a man whose conduct threatened those jobs. Whether this gave rise to a cause of action was, in the view of the Ohio courts, a question to be decided in accordance with common law tort rules. They treated the union's conduct as a tortious conspiracy to deprive plaintiff of his right to earn a living.

Congress, however, long ago decided that the common law was ill-equipped to deal with the problems of modern industrial relations. It enacted a statute to govern labor relations in industries affecting commerce and established the National Labor Relations Board as the agency with exclusive primary jurisdiction to enforce that statute and to make the initial judgments under it.

The question in this case, as in any other pre-emption case, is whether the conduct involved is the kind of conduct which Congress intended to be governed by its labor relations statute or is, on the other hand, the kind of conduct which Congress intended to be left to the states to govern. As phrased by this Court, the question is whether the conduct is arguably either protected by Section 7 of the Act or prohibited by Section 8. This formulation is really simply a way of asking whether, in deciding a particular case, the balancing of interests which every legal judgment entails is

to be made using the values, and the procedural rules, prescribed in the National Labor Relations Act or by using the values, and the procedural rules, of the general state law. The issue, in short, is whether Congress intended the standards established by the Act to apply to the kind of conduct involved in the case. If it did, then state actions is prohibited.

Decision on the merits in this case necessarily requires exactly the kind of balancing of interests which Congress has confided to the National Labor Relations Board, and which cannot therefore be made by the states. The action by the union of which plaintiff complains was action designed to preserve jobs for members of the union by securing the removal of a man who was taking those jobs away. This objective was accomplished by a concerted refusal to work and was therefore at least arguably protected activity under Section 7 of the Act unless it fell within those categories of concerted activity which Congress prohibited in Section 8.

Section 7 of the Act, in very broad language, protects the right of employees to organize, to bargain collectively, and to engage in concerted activities for their "mutual aid or protection." Section 8(b) of the Act specifically prohibits certain types of union activities which adversely affect employees. In order to decide in which category the union's conduct here falls, certain difficult questions under the Act would have to be decided.

It is not necessary, or even proper, for this Court to decide how this case might have been resolved by the NLRB. Indeed, it is impossible for this Court to do so, since there is no way of knowing what facts the Board would have found. It cannot be assumed—particularly on the record in this case—that the Board would even have found that the plaintiff's loss of employment was in any way attributable to any action of the union. All that we must show is that decision would necessarily involve the application of stand-

ards which the Board has been charged with applying. As a way of making that showing, we will demonstrate that what the union was alleged to have done in this case would probably have been found to be an unfair labor practice.

### A. *The Arguable 8(b)(2) Violation*

Prior to his discharge, the plaintiff had worked either as a "superintendent" or a "foreman." He claimed that the union had prevented him from obtaining employment in either capacity. The first question which the NLRB would have to resolve is whether the work which plaintiff lost included work as an "employee" as defined in Section 2(3) of the Act or was solely work as a "supervisor" as defined in Section 2(11).

Assuming that the work involved was work as an "employee," the union's alleged effort to prevent plaintiff from keeping or obtaining employment in that capacity because of his violation of a union rule would be a clear violation of Section 8(b)(2) of the Act. It is an unfair labor practice under that Section for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)," which in turn makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . ."

In *Radio Officers* v. *NLRB,* 347 U. S. 17 (1954), this Court held that it is a violation of Section 8(b)(2) to induce an employer to deny employment to a man because he had disobeyed a union rule, even though he had not actually lost his union membership, since the purpose of such discrimination was to encourage members to perform the obligations or supposed obligations of membership." *Id.* at 52. The Court reasoned:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to free-

> ly exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Id.* at 40

Of course, Section 8(b)(2) would not be applicable if we assume that neither a foreman nor a superintendent is an "employee" within the meaning of the Act. It is fairly clear from the record that a "superintendent" is a supervisor within the meaning of Section 2(11). It is probable, however, that a "foreman," as the term is used in the context of this case, is an employee within the meaning of Section 2(3).

The record shows that foremen were treated, both by the union and by the employers, as employees. They were covered by the collective bargaining agreement (R. 141), they were required to be members of the union (R. 50), they were often chosen on an *ad hoc* basis from among the members of the crew (R. 141-42), and they were permitted to perform the work of the trade along with the crew (R. 111). None of these things were true of superintendents.

The only duty performed by a foreman which could in any sense be regarded as supervisory was to transmit to his crew the instructions of the job superintendent. The authority to direct employees, however, is not in itself sufficient to make one a supervisor under Section 2(11), if such authority is "merely routine" in nature, and does not require "the use of independent judgment." The routine nature of the foremen's responsibilities is indicated by the fact that they were commonly called "pushers" (R. 110, 127), and apparently did not initiate orders themselves. They appear to have been, in short, what are commonly called "strawbosses" or "group leaders," whom the Board has held to be employees rather than supervisors:

> "The Board has had frequent occasion to distinguish between strawbosses or group leaders on the one hand and supervisors on the other, and has found that the

fact that strawbosses or group leaders are more experienced, receive slightly higher pay, and transmit routine instructions does not convert their status from employees to supervisors." *New York Shipping Assn.* 116 N.L.R.B. 1183, 1187 (1956)[3]

This question, of course, is not one which the Court must, or even should, decide. Even if the issue of whether the union's conduct constituted an unfair labor practice turned on whether plaintiff was a "supervisor" or an "employee," the fact that he was arguably an "employee" would be sufficient to pre-empt state court jurisdiction. See *Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962). And in this case, as we shall see, the question of whether plaintiff was an employee or a supervisor is not determinative of *whether* an arguable unfair labor practice was committed, but only of the kind of unfair labor practice involved.

### B. *The Arguable 8(b)(1)(A) Violation*

Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of the rights guaranteed in Section 7. As we have seen, those rights include the right to organize, to bargain collectively, to engage in concerted activity, "or to refrain from any or all of such activities." The Board and the courts of appeals have held, in a long line of cases, that an employer who discharges a supervisor because of his refusal to participate, or to participate with sufficient vigor, in an antiunion campaign coerces employees in the exercise of their Section 7 rights, because the effect of such conduct is "to cause nonsupervisory employees reasonably to fear that the Respond-

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[3] See also *International Brotherhood of Boilermakers*, 119 N.L.R.B. 1605 (1958), *enforced*, 259 F. 2d 957 (D. C. Cir. 1958); *Lancaster Welded Products, Inc.*, 130 N.L.R.B. 1478, 1480 (1961); *Freeman Loader Corp.*, 127 N.L.R.B. 514, 516 (1960); S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

ent would take similar action against them if they continued to support the Union." *Talladega Cotton Factory, Inc.*, 106 N.L.R.B. 295, 297 (1953), *enforced*, 213 F. 2d 209 (5th Cir. 1954). See also *General Engineering, Inc.*, 131 N.L.R.B. 648 (1961), *enforcement denied on other grounds*, 311 F. 2d 570 (9th Cir. 1962); *NLRB* v. *Brookside Industries, Inc.*, 51 L.R.R.M. 2148 (4th Cir. 1962); *NLRB* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (5th Cir. 1957), *cert. denied*, 355 U. S. 864 (1957). While the Board appears never to have been faced with the converse situation —discharge of a supervisor because he is not sufficiently pro-union, or because he refuses to comply with a union rule—the same reasoning would seem to be applicable. Surely, the discharge of the plaintiff for his violation of the union's rule against assisting boilermakers would lead non-supervisory employees reasonably to believe that they would meet the same fate if they were to violate that rule. Accordingly, it is at least arguable that when a union obtains the discharge of a supervisor in circumstances such as are alleged to have been involved here, the effect is to coerce employees in the exercise of their right "to be good, bad, or indifferent [union] members" in very much the same sense that the discharge of an employee was found to have that effect in *Radio Officers.*

Moreover, to the extent that the union interfered with plaintiff's employment as a supervisor, it arguably violated not only Section 8(b)(1)(A), but Section 8(b)(1)(B) as well.

### C. *The Arguable 8(b)(1)(B) Violation*

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This provision was designed to permit employers to hire or fire supervisors without union interference. As stated by Senator Taft, its purpose is to prevent a union from "saying to the employer,

'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' " 2 Leg. Hist. of LMRA 1012. See also *Id.* at 1077. The Senator could not have more precisely stated the plaintiff's allegation in the present case.

In a decision which was affirmed by an equally divided Supreme Court, the Board and the First Circuit have even held it to be a violation of Section 8(b)(1)(B) for a union to demand from an employer an agreement that all supervisors must be union members, even though the union was willing to agree not to "discipline the foreman for carrying out written instructions of" the employer. *International Typographical Union,* 123 N.L.R.B. 806 (1959), *enforced,* 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided Court,* 365 U. S. 705 (1961). The Court of Appeals held:

> "There can be no doubt that the foreman's duties necessarily included participation in the adjustment of grievances. Hence, by insisting that the foremen must be union members, the unions were restraining and coercing the employers in the selection of their representatives for grievance adjustment purposes. Not only would the clause as proposed by the unions limit the employers' choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union." 278 F. 2d at 12

If it is a violation of Section 8(b)(1)(B) to demand an agreement which would give the union the "power to force the discharge or demotion of a foreman" even though that power is combined with a pledge that it will not be used to frustrate the orders of the employer, it is *a fortiori* a violation for the union in fact to force the discharge of a supervisor, particularly where the reason for the union's action is that the supervisor, in the performance of his duties, violated a union rule.

In short, the present case falls squarely within the scope of the National Labor Relations Act. It involves precisely the kind of conduct which Congress has regulated as part of its comprehensive regulation of labor relations. What the union is alleged to have done in this case is plainly either protected by Section 7 or prohibited by Section 8. The decision as to whether it is protected or prohibited must be made by the NLRB, in accordance with the rules laid down by Congress. It cannot be made by a state court in accordance with the common law of torts.

## II. NO EXCEPTIONAL CIRCUMSTANCES EXIST IN THIS CASE WHICH WOULD JUSTIFY DEPARTURE FROM THE PRINCIPLE OF FEDERAL PREEMPTION

We have seen that the decisions of this Court make clear that state courts may not ordinarily regulate conduct which is regulated by the National Labor Relations Act. We have also seen that the conduct of the union which was the basis of the plaintiff's cause of action in this case is the type of conduct which the Act regulates. However, this does not quite complete the syllogism. It is still necessary to determine whether any sound basis exists for excluding this case, or cases of this nature, from the operation of the ordinary rules of pre-emption.

The exception which this Court has recognized in cases involving physical violence is, of course, not applicable here, since violence is totally absent from this case. Nor is the exception recognized in *International Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (1958) applicable. That case involved a suit brought under state law "for restoration of [plaintiff's] membership in the unions and for damages due to his illegal expulsion." *Id.* at 618. The state court had found that the plaintiff was unlawfully expelled from membership, and had entered a decree ordering his reinstate-

ment and awarding him damages. The question presented in this Court was whether the state court had jurisdiction to include in the relief damages attributable to the loss of employment opportunity which was found to have resulted from the wrongful expulsion from membership.

This Court, relying principally on the fact that the National Labor Relations Act expressly disavows any intention to regulate the internal affairs of unions, held that such matters are properly within the regulatory power of the states. It then went on to hold that, since plaintiff's cause of action was properly within the jurisdiction of the state court, it would "mutilate the comprehensive relief of equity" and produce "an incongruous adjustment of federal-state relations" to hold that the state court could not award consequential damages, arising from the loss of employment caused by the loss of union membership.

The basis of the *Gonzales* decision, in short, was that "the crux of the claim" which was there involved was wrongful expulsion from union membership, a matter not regulated —and therefore not pre-empted—by the Act. In this case, the "crux of the claim" was wrongful interference with plaintiff's employment, a matter which, as we have seen, is very much regulated by the Act. As the Ohio Supreme Court itself recognized:

> "Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. He is not asking for equitable relief. He is alleging that the union to which he belonged and certain named officials thereof committed a common law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment with the William B. Pollock Company, for which he asks money judgments" (R. 9).

Thus, whatever the vitality of the *Gonzales* decision, it is not relevant to this case.[4]

Respondent has suggested, in his brief in opposition to the petition for certiorari, that perhaps the pre-emption principle ought not to apply at all to suits by individuals against their unions, that the principal purpose of the Act was to regulate relations between unions and employers, and that such "highly individual" problems as that involved here were not "of substantial regulative concern to the framers of the N.L.R.A." The notion that only important federal laws are the supreme law of the land, and that state courts are free to ignore unimportant ones, is not one which we can find in the Constitution or in any decision of this Court. But in any event, there is simply no evidence that Congress considered the portions of the Act governing the relations between unions and employees or between unions and supervisors any less important than those governing the relations between unions and employers, or between employers and employees.

The very heart of the federal labor policy has always been Section 7 of the Act. Prior to 1947, that Section protected only the right of employees to organize, bargain collectively, and engage in concerted activities. In 1947, Congress

[4] There is, in fact, substantial basis for doubt as to whether *Gonzales* can logically survive this Court's subsequent decision in *Garmon*. One reason relied upon in *Gonzales* for not requiring the plaintiff to go to the NLRB to remedy his loss of employment was that the Board could grant only "partial relief" in the form of back pay, and could not "mulct in damages for mental or physical suffering." In *Garmon* this Court recognized that "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." 359 U. S. at 247. Thus, the difference between the state remedy and the federal remedy for loss of employment resulting from wrongful expulsion from union membership now appears to be a ground for precluding, rather than allowing, application of the state remedy, even where the "crux" of the action is loss of membership rights. In the light of *Garmon*, this may be a proper, rather than an "incongruous," adjustment of state and federal law.

amended Section 7 to provide that employees shall also have the right "to refrain from any or all of such activities." To implement this amendment; it enacted Sections 8(b)(1)(A) and (2), which have been discussed above, and which deal solely with the relations between unions and employees. It also amended Section 8(a)(3), to prohibit the "closed shop" and sharply restrict the "union shop" by prohibiting the discharge of employees who have lost their union membership for any reason other than non-payment of dues. Nowhere in the language of the statute or its legislative history is there any suggestion that these portions are any less important than any other.

The provisions of the 1947 amendments which put supervisors beyond the reach and control of unions were also regarded by Congress as of central importance to the overall labor policy. See S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947).

We come, then, to the ultimate question on which we believe this case must turn: does the exercise of state jurisdiction in cases such as this tend to frustrate the purposes which the federal act was intended to achieve? Obviously, the answer is yes.

The federal statute was intended to provide a single, uniform body of federal law governing labor relations in industries affecting interstate commerce. As we have seen, that statute strikes a delicate balance between the right of employees to engage in collective action for their mutual aid and protection and the right of individuals to be free of union interference with their employment. The application of state law, which is based on rules and policies quite different than those embodied in the federal statute, necessarily frustrates the federal regulatory scheme.

To assure competent and consistent administration of the federal labor policy, Congress established an administrative agency, with exclusive primary jurisdiction to enforce the Act and to fashion remedies for unfair labor practices which would effectuate federal labor policy. "One of the purposes

which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793, 800 (1945). Since the factual issues in this case were resolved by a lay jury, this Congressional purpose was also frustrated.

The federal statute was intended to provide appellate review of findings of fact, which findings are to be set aside if they are not supported "by substantial evidence on the record considered as a whole." § 10(f), 29 U. S. C. § 160(f). In this case, the Ohio courts applied their own standard of review, which precludes reversal of the jury verdict unless there is "no evidence" to support it.

No case could illustrate better than this one does the principle recognized in all the pre-emption cases and most succinctly articulated in *Garmon:* "Administration is more than a means of regulation; administration is regulation." For although the conduct which the state court held to be tortious in this case would probably also have been unlawful under the Act, we believe this Court, upon examination of the record in this case, will be forced to conclude, with us, that the NLRB would never have found a violation in this case, and if it had, the finding would have been set aside on review. This is apparent from the opinion of the Ohio Court of Appeals. That opinion recited that plaintiff was about 68 at the time this case arose, was receiving social security, and had been able to secure work which always terminated before he earned the $1,200 in any year which would disqualify him. It also noted that he had the habit of advising prospective employers that his "foremen's rights" had been suspended, and that only one contractor (out of nine who testified) indicated he had ever contacted the Union on this question. It concluded that "there is very little that supports he cause sued on here" but that it could

not say that there was absolutely no evidence to support the judgment. This would seem to imply quite clearly that the court would have reversed the judgment had it been permitted, by Ohio law, to apply the "substantial evidence" test.

A state court judgment for damages which is based on a finding that a union committed what amounts to an unfair labor practice can be just as destructive of the purposes of the Act as a state court judgment for damages against a union for engaging in an activity which is protected under the Act, if on the same evidence the Board would not have found a violation, or would have applied a different remedy. In this case, it is particularly unlikely that the result which was reached in the state court would have been reached before the NLRB. But in the final analysis there is only one way to assure that federal labor policy will be implemented, and that is to enforce the statute which Congress enacted for that purpose, and which gives the NLRB exclusive jurisdiction over conduct which is governed by Sections 7 and 8 of the National Labor Relations Act.

## CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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